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4 STATE BAR NO. 85995

5 Attorney for Defendant

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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) Crim. No. 08 CR 2797-4-JLS
11) NOTICE OF MOTION AND MOTION
12 Plaintiff,) FOR DISCOVERY; TO PRESERVE
13) MARIJUANA
14 v.)
15 JOSE ALBERTO VARGAS-GUILLEN) Date: 19/26/08
16) Time: 1:30 P.M.
17 Defendant.) Judge: Sammartino
18 _____)

19 Please take notice that at the above time and date the
20 defendant will move for discovery and to preserve evidence.

21 Dated: August 22, 2008

22 s/ Douglas C. Brown

23 DOUGLAS C. BROWN, ATTORNEY

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UNITED STATES DISTRICT COURT

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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,) Crim. No. 08 CR 2797-4-JLS
11)
12 Plaintiff,) MEMORANDUM OF POINTS AND
13) AUTHORITIES IN SUPPORT OF
v.) DISCOVERY
14)
15 JOSE LUIS ALBERTO-GUILLEN)
16) Date: 9/26/08
Defendant.) Time: 1:30 A.M.
17) Judge: Sammartino
18)
19)

TO THE U.S. ATTORNEY:

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STATEMENT OF THE CASE

21

The defendant has been charged with marijuana smuggling in
22 violation of 21 U.S.C. 841(a)(1). The defendant is in custody.

23

STATEMENT OF FACTS

24

For purposes of this motion, the applicable facts are set forth
in the indictment and are incorporated by reference.

25

EXONERATORY EVIDENCE

26

It is well established that the government must disclose to the
defendants all exculpatory evidence within its possession. Brady
27 v. Maryland, 373 U.S. 834 (1963). (Including evidence relating to
28

1 departures under the Sentencing Guidelines.)

2 In Brady v. Maryland, supra, the United States Supreme Court
3 announced the rule that:

4 Suppression by the prosecution of evidence
5 favorable to an accused upon request violates
6 due process where the evidence is material to
guilt or to punishment irrespective of the good
faith or bad faith of the prosecution.

7 Brady v. Maryland, supra, at page 87.

8 Subsequent cases have held that "the prosecution is not to
9 decide . . . the defense which is useful." United States v. Hibler,
10 463 F.2d 455 (9th Cir. 1972).

11 STATEMENT OF DEFENDANT

12 Rule 16(a)(1)(A) provides in pertinent part:

13 Upon request of a defendant the Government
14 shall permit the defendant to inspect and copy
or photograph: any relevant written or recorded
15 statements made by the defendant, or copies
thereof, within the possession, custody or
control of the Government, existence of which
16 is known, or by the exercise of due diligence
may become known, to the attorney for the
17 Government; the substance of any oral statement
which the Government intends to offer in
18 evidence at the trial made by the defendant
whether before or after arrest in response to
19 interrogation of any person then known to the
defendant to be a Government agent; and
20 recorded testimony of the defendant before a
Grand Jury which relates to the offense
21 charged. . . .

22 Thus, by the terms of the rule itself, a defendant has the
23 right to inspect and copy written or recorded statements made by
24 him to government agents or within the custody or control of the
25 government. The rule has also been extended to permit discovery of
26 the written summary of defendant's oral statements contained in the
27 hand-written notes of a government agent. United States v. Johnson,

1 || 535 F.2d 999 (2nd Cir. 1975); United States v. Lewis, 511 F.2d
2 792 (D.C. Cir. 1967) Loux v. United States, 389 F.2d 911 (9th Cir.
3 1968.

4 A statement also includes tape recordings:

5 The statutory safeguards more clearly deal with
6 tape recordings such as the one before us.
7 These safeguards refer not to the probative
8 effect of the evidence, but to its general
9 nature. Rule 16(a), Federal Rules of Criminal
10 Procedure, provides for Court-ordered discovery
11 of 'written or recorded statements or
12 confessions made by the defendant.' The tape
13 at issue in these cases was such a 'recorded
14 statement'.

15 . . . Even more than formal statements,
16 surreptitiously recorded 'statements' will be
17 difficult for the Defendant to reconstruct from
18 memory and will often, as here, be most
19 critical to his fate at trial. We agree with
20 a panel of the Second Circuit that the Notes of
21 the Advisory Committee indicate that the
22 amended Rule was intended to apply even to pre-
23 arrest statements made by a defendant during
24 the course of his crime and was meant to
25 broaden materially the scope of discovery
26 available to a defendant.

27 United States v. Bryant, 439 F.2d 692 (D.C. Cir. 1971).

28 PRIOR RECORD OF THE DEFENDANT

29 Rule 16(a)(1)(B) of the Federal Rules of Criminal Procedure
30 provides that "upon request of the defendant, the government shall
31 furnish to the defendant such copy of his prior criminal record if
32 any, as is within the possession, custody or control of
33 the government ..." The defendant hereby requests a copy of his
34 prior record.

35 DOCUMENTARY EVIDENCE

36 Federal Rules of Criminal Procedure 16(a)(1) provides in

1 || pertinent part:

Upon request of the defendant the Government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody or control of the Government, and which are material to the preparation of his defense or are intended for use by the Government as evidence in chief at the trial or were obtained from or belong to the defendant.

All books, records, documents or tangible objects material to the indictment and within the possession or control of the Government are discoverable pursuant to subdivision©. United States v. Tanner, 279 F. Supp. 457 (N.D. Ill. 1967); United States v. Wilson, 20 F.R.D. 569 (S.D.N.Y. 1957).

PHYSICAL AND MENTAL EXAMINATIONS, LABORATORY AND SCIENTIFIC TESTS AND EXPERIMENTS

15 Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure
16 requires the government to permit a defendant to inspect and copy
17 any results of reports of physical or mental examinations and
18 scientific tests or experiments which are in the possession,
19 custody, or control of the government, the existence of which is
20 known, or by the exercise of due diligence may become known to the
attorney for the government.

Physical and mental examinations of government witnesses which
may be relevant to the competence or credibility of such witness
should be discoverable under this section as well as Brady v.
Maryland, *supra*, 373 U.S. (1966).

WITNESS/INFORMANT STATEMENTS

Although Rule 16(a)(2) of the Federal Rules of Criminal

1 Procedure does not make it mandatory for the court to order the
2 government to disclose the statements made by government witnesses
3 and/or informants, except as provided in 18 U.S.C. section 3500, it
4 is requested that the government provide the defense with copies of
5 all investigative reports prepared by law enforcement agents
6 concerning the subject matter of any agent's testimony and
7 witness/informant testimony or statements. See United States v. Del
8 Torro-Soto, 676 F.2d 13, 15-17 (1st Cir. 1982). This request
9 includes but is not limited to: (1) oral reports, tape recordings
10 and/or any other electronic monitoring, or any surveillance,
11 telephone calls, or personal contacts between government agents or
12 confidential informants and defendant and co-defendants,
13 confidential informants or agents; (2) all reports or statements or
14 interviews of any of the above individuals, or other witnesses to
15 be called by the government at trial.

16 It is requested that all Jencks Act material, including grand
17 jury testimony of those witnesses who will be testifying at
18 trial, should be promptly disclosed to the defense to avoid delays
19 at the time of trial and to allow an opportunity to evaluate, and
20 possibly conduct further investigation. See Rule 801(d)(1)(A),
21 Federal Rules of Evidence. This request further includes
22 confidential informant statements prepared by or for the informant
23 during the course of this case. Our request is made pre-trial in
24 order to avoid disruptions and delays during trial for the review
25 of such material.

26 REQUEST FOR DISCOVERY OF RAW NOTES

27 Under United States v. Harris, 452 F.2d 1094 (9th Cir. 1976),

1 defendant moves the court to order the government to produce or
2 preserve any raw notes by investigative officers of all witness
3 interviews. Should the government be unable to comply because of
4 the destruction of such notes, this could be grounds for sanctions,
5 such as dismissal of the indictment or striking of the testimony of
6 any witness to whom such notes relate. See, United States v.
7 Harris, supra; United States v. Well, 575 F.2d 1383 (9th Cir.
8 1978); United States v. Johnson, 521 F.2d 1313 (9th Cir. 1975).

9 DISCLOSURE BY THE GOVERNMENT OF THE EVIDENCE
10 IT INTENDS TO USE AGAINST THE DEFENDANT

11 Pursuant to Rule 12(d)(2), defendant requests this Court order
12 the government to disclose the evidence it intends to use against
13 the defendant at trial. This request includes but is not
14 limited to: (1) any prior similar acts of the defendant or co-
15 defendants, including any discussions or negotiations by defendants
16 concerning alien smuggling, and their relevance under Rule 404(b),
17 Federal Rules of Evidence; (2) all statements claimed to have been
18 made by any co-conspirator during the course of or in furtherance
19 of the alleged conspiracy pursuant to Rule 801(d)(2)(E), Federal
20 Rules of Evidence (FRE), including (a) the date of the alleged
21 conversation, (b) the location of each of the persons present at the
22 time of the conversation, © the substance of each conversation, (d)
23 whether the statements were memorialized in any manner, including
24 rough notes, reports, or tape recordings, and copies of all such
25 rough notes, reports, or tape recordings, and copies of all such
26 memorializations; (3) all statements made by defendant

1 classified as admissions under Federal Rules of Evidence
2 801(d)(2)(A), (B), or ©, including (a) the date of the alleged
3 statements, (b) the location of each of the persons present at the
4 time of the conversation, (c) the substance of each conversation, (d)
5 whether the statements were memorialized in any manner, including
6 rough notes, reports, or tape recordings, and copies of all such
7 rough notes, reports, or tape recordings, and copies of all such
8 memorialization, (4) all monitored conversations made by the
9 government between its agents and/or informants and the defendants
10 in this case; (5) any prior convictions

11 HENTHORN REQUEST

12 The defense requests the government review personnel files for
13 impeachment material. United States v. Henthorn, 932 F.2d 29
14 9th Cir. 1991).

15 REQUEST FOR PRESERVATION OF EVIDENCE

16 The defense requests that all evidence in the custody,
17 control, or possession of the government or it's agents be
18 preserved, or that the defendant be given timely notice of
19 it's pending destruction. Specifically, the defendant requests that
20 the marijuana be preserved in order for it to be weighed, without
21 the packaging. The indictment alleges 107.4 kg of marijuana which
22 is close to the minimum mandatory.

23 EVIDENCE RELATING TO ELECTRONIC SURVEILLANCE

24 The defense requests disclosure of any evidence relating
25 to wiretapping, electronic surveillance, or the taping of
26 jail conversations.

27 PLEA AGREEMENTS AND BENEFITS

1 There may in this case be plea agreements, financial compensation
2 payments, decisions not to prosecute or file charges, or other
3 benefits accruing to witnesses that must be disclosed to the
4 defense. Included in this category are agreements with individuals
5 to "charge bargain", which is to say, a government decision to file
6 charges that limit the defendant's Sentencing Guideline exposure.

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9 Dated: August 21, 2008

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11 Respectfully Submitted,

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13 s/Douglas C. Brown
14 DOUGLAS C. BROWN
15 Attorney for Defendant

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4 Attorney for Defendant

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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,) 08 CR 2797-4-JLS
10)
10 Plaintiff,)
11)
11 v.)
12) PROOF OF SERVICE
12)
13 JOSE ALBERTO VARGAS-GUILLEN)
14)
14)
15 Defendant.)

16 STATE OF CALIFORNIA)
17 COUNTY OF SAN DIEGO) ss.

18 DOUGLAS C. BROWN, being first duly sworn, deposes and states:

19 That he is a citizen of the United States and resident of San
20 Diego, California.

21 That his business address is 225 Broadway, Suite 2200, San
22 Diego, California, that he is over the age of eighteen years and is
23 not a party to the above-entitled matter.

24 That on August 22, 2008 he served by Notice of Electronic
25 Filing, a Notice of Discovery Motion and Memorandum of Points and
26 Authorities on:

27 Office of the U.S. Attorney

1 Federal Office Building
2 880 Front St.
3 San Diego, Ca. 92101;

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6
7 I declare under penalty of perjury that the foregoing is true and
8 correct. Executed at San Diego, California, on August 22, 2008.

9
10
11 s/ Douglas C. Brown

12 DOUGLAS C. BROWN, ATTORNEY

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